UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM REIGEL, Appellant -vs- SECURITIES and EXCHANGE COMMISSION, Respondent.	)	No. 22459

APPELLANT'S OPENING BRIEF

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Attorney for Appellant

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CITATIONS

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the inference of guilt drawn by the Hearing Examiner from Reigel's failure to testify improper, thereby tainting the record?

2. Did the imposition of a penalty by the Commission far in excess of that which the Hearing Examiner assessed indicate that the record failed to reflect accurately the substance of the transactions, or that there was a complete lack of standards as to the penalties that prohibited conduct calls for?

3. Were the witnesses for the Division improperly educated by an Agent of the Division prior to their testimony?

4. Was the record tainted by the admission and reliance on incompetent hearsay evidence?

5. Did the fact that Reigel was without counsel at a crucial point in the proceedings, the Hearing, multiply the impact of other procedural infirmities and interfere with the compilation of a record which accurately reflected the facts?

6. Was there sufficient evidence in the record to support a finding that Reigel wilfully sold unregistered securities?

7. Was there sufficient evidence to support the conclusion that there was no reasonable basis for the predictions made by Reigel as to the future of Jayark stock?

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF PRIOR PROCEEDINGS.

This is an appeal from public proceedings under the provisions of Sections 15(b) and 15A of the Securities Exchange Act of 1934. The Order for Public Proceedings (Order) was entered by the Commission on October 20, 1964, and implemented by a further Order of the Commission dated July 6, 1965, which scheduled a hearing date and appointed a Hearing Examiner. The Order alleged willful violations of Sections 5(a) and (c) of the Securities Act of 1933 in the sale of unregistered stock in Jayark Films Corporation (Jayark) and Kramer-American Corporation, of the anti-fraud provisions of the Acts and Rules 10b-5 and 15c1-2 under the Exchange Act in the sale of Jayark shares, and of Rules 10b-6 and 15c1-8 under the Exchange Act while effecting a distribution of Jayark shares, by Century Securities Company (Registrant), Fred Colton and David T. Fleischman (the partners of Century Securities) and Appellant herein, William Reigel (Reigel), a salesman for Century Securities, and several other salesmen, (Robert Nees, Pierre Pambrun, Jay Cook, Donald Brophy, and John Desbrow).

John Desbrow made an offer of settlement which was accepted by the Commission resulting in a stipulation (dated March 25, 1965, R. 1268) pursuant to which Desbrow was sus-

pended from being associated with a Broker-Dealer for 45 days, and accordingly, Desbrow ceased to be a party to the proceedings.

The Order for Hearing was served on Reigel pursuant to the request of the Division of Trading and Markets (the Division). Reigel filed an answer pro se. Hearing Examiner, Sidney Gross, under the provisions of Rule 8(b) of the Commission's Rules of Practice, held a prehearing conference on August 5, 1965, at Los Angeles, California. Reigel attended that conference.

Hearings were held at Los Angeles, California, on August 9, 25-27, 1965, before Sidney Gross, Hearing Examiner. Reigel appeared at the hearings, pro se. The Division of Trading and Markets appeared by Arthur W. Fred, Attorney.

On October 7, 1965, the "Proposed Findings, Conclusions and Brief on Behalf of the Division of Trading and Markets" was filed. On December 20,1965, the "Opposition to Proposed Findings, Conclusions and Brief on Behalf of the Division of Trading and Markets, and Proposed Findings, Conclusions and Brief on Behalf of Respondents William Reigel, Pierre Pambrun and Jay B. Cook" was filed. The "Reply by the Division of Trading and Markets to Opposition to Proposed Findings, Conclusions and Brief on Behalf of the Division of Trading and Markets and Proposed Findings, Conclusions and Brief on Behalf of Respondents William Reigel, Pierre Pambrun and Jay B. Cook" was filed on January 6, 1966.

On February 14, 1966, the Hearing was re-opened to hear additional testimony concerning the charges against Nees, who had alleged that he was not served with notice of the first hearing.On March 30,1966, the "Proposed Findings and Conclusions Submitted on Behalf of Robert Nees"were filed.A Supplemental Brief for Appellants Reigel,Pambrun and Cook was filed on April 5, 1966.The"Reply by Division of Trading and Markets to Proposed Findings and Conclusions Submitted on Behalf of Respondent Robert W.Nees" was filed on April 21,1966. (The Division, in its April 21,1966 brief, acknowledged that it had made no proposed findings that any of the "individual respondents"sold unregistered shares of Kramer-American Stock,R.1638).

The Initial Decision of the Hearing Examiner was dated August 26, 1966. The Hearing Examiner concluded inter alia that Appellant Reigel willfully violated Sections 5(a) and 5(c) of the Securities Act of 1933 by the sale and delivery of unregistered Jayark stock.(R.1680).The Hearing Examiner found that Appellant Reigel, in the offer and sale of Jayark stock, willfully violated Sections 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act,and Rules 10B-5 and 15C-1-2 (R.1701,1702). (It should be noted that the Jayark stock referred to here was registered, and was not the same stock that allegedly had been sold without a registration statement.

The record shows that at the time of the hearing Fred Colton informed the Hearing Examiner that Reigel

and other of the Respondents didn't want to testify because the Hearing Examiner had allowed inquiry into areas outside the scope of the charges in questions asked of Mr. Colton prior to the time Reigel and the others decided not to testify. (R. 519). The line of questioning specifically covered prior associations with broker-dealers who had been disciplined (R. 469). The Hearing Examiner reserved ruling on the objection and allowed the questions (R. 469). In his Initial Decision, the Hearing Examiner concluded that the objection to these questions was well taken (R. 1696, n. 48). Nevertheless, the Hearing Examiner, in his Initial Decision, stated that he inferred from Reigel's failure to testify that his testimony would have been adverse (R. 1691).

The Hearing Examiner concluded that Reigel should be suspended from being associated with a dealer for six months, the registration of Century Securities should be revoked, and that it should be expelled from N.A.S.D. The Registrant's partners, Colton and Fleischman, were to be barred from being associated with a broker or a dealer with the proviso that after one year they could apply to become associated with a registered broker-dealer in a non-supervisory capacity. Salesman Nees was barred from being associated with a broker-dealer, and salesman Pambrun was censured (R. 1703).

The Commission determined on its own Motion to review the Initial Decision, and accordingly an Order for Review of the Initial Decision was entered October 3, 1966 (R. 1754).

The "Brief on Behalf of the Division of Trading and Markets in Support of Exceptions to the Initial Decision" was filed on October 31, 1966. The "Brief on Behalf of Respondent Jay B. Cook in Opposition to Brief of the Division of Trading and Markets filed October 31, 1966" was filed on December 1, 1966. Reigel, in propria persona, joined in said Brief of Jay Cook by a document dated December 1, 1966 (R. 1882). The "Findings and Opinion of the Commission" were entered on July 14, 1967. The Commission found that the Registrant, and the salesmen, (including Reigel) "willfully violated the anti-fraud provisions of Section 17(a) of the Securities Act of 1933, and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 17 CFR 240.10.b-5 and 15c-2 thereunder, in that they engaged in a scheme to defraud in the offer and sale of securities (R. 2001). The Registrant was found to have violated Section 5(a) and (c) of the Securities Act, and Reigel was found to have willfully participated in such violations with respect to the sale of unregistered Jayark shares (R.2007, 2008).

The Commission, as distinguished from the Hearing Examiner, concluded that the broker-dealer registration of Century Securities should be revoked, and that the partners and the salesmen should all be barred permanently from being associated with a broker-dealer (R. 2011).

A "Petition for Rehearing of Review of Initial Decision of Hearing Examiner by Respondent William Reigel" was

filed on August 21, 1967. A Memorandum Opinion and Order Denying Rehearing was entered on November 1, 1967 (R. 2013).

A "Statement of Points to be Relied Upon in Petition for Review" was filed February 21, 1968, by Appellant Reigel.

B. FACTS

The Registrant, Century Securities, was a broker-dealer registered with the Securities and Exchange Commission on June 16, 1960. (Stipulation, pre-hearing conference, page 14, vol. 1 Transcript of Record). William Reigel, Robert Nees, Pierre Pambrun, Jay B. Cook, Donald Brophy, and John Desbrow were registered sales representatives in the employ of the Registrant at the time, or times, pertinent to the proceedings (Ibid.)

Registrant used the mails and means and instrumentalities of Interstate Commerce while engaged in the transactions alleged in the Order for Proceedings, and effected transactions otherwise than on a National Securities Exchange (Ibid.)

In order to avoid confusion it must be noted that Reigel has been found to have engaged in two separate violations with respect to Jayark stock:

(1) The sale of unregistered Jayark shares.

(2) Misrepresentations with respect to the sale of other shares of Jayark stock which were properly registered.

1. With regard to the sale of unregistered securities:

The Division of Trading and Markets acknowledged in its Brief of April 21, 1966, that it had made no proposed findings that any of the "individual respondents" had sold ungegistered shares of Kramer-American stock (R. 1638). Neither the Initial Decision of the Hearing Examiner, nor the Findings of the Commission indicate that Reigel, or any of the other salesmen sold unregistered shares of Kramer-American stock, and, accordingly, the Kramer-American transactions are not in issue as regards the salesmen, including Reigel.

At all pertinent times Reuben R. Kaufman was the President and a Director of Jayark Films Corporation, and Jane Kaufman, his wife, was Secretary and a Director. On September 4, 1964, the Registrant purchased as principal 3,750 shares of Jayark stock at 5½ (Stipulation, pre-hearing conference, page 14, vol. 1). On September 14, 1964, Registrant received certificates for 3,750 shares of Jayark, of which 3,000 were registered in the name of Jane Kaufman, and 750 shares in the name of Reuben Kaufman. These certificates were issued to the Kaufmans by transfer from larger certificates, which were originally issued to and directly acquired by the Kaufmans from the issuant and were not covered by any filing under the Securities Act (Ibid.) "Registrant was an underwriter of Jayark stock earlier in the

same year at which time there was no question as to the propriety of the issue." (Initial Decision, page 29, R. 1698). Reigel was the addressee of some, but not most, of the correspondence from the Kaufmans with regard to the purchase of Jayark stock by Century Securities (R. 459, 460). In a letter dated September 9, 1963, from Reuben Kaufman to Reigel, Kaufman stated that the shares in question were exempt from registration and that his conclusion was based on the legal opinion of his attorney (Division's Exhibit No. 3). Registrant wrote Kaufman on October 29, 1964, requesting a copy of Kaufman's attorney's opinion with regard to the Jayark exemption (Respondent's Exhibit C). The opinion, dated May 23, 1963, was mailed to Registrant on November 2, 1964. (Respondent's Exhibit C). Kaufman's attorney had relied on Rule 53 under the Securities Act as a basis for exemption of the shares (Ibid.).

From September 4 to September 11, 1963, Registrant, as principal, through its sales representatives, sold 2,320 shares of Jayark stock short to the public. This short position was covered by the shares acquired from Kaufman. The balance of the stock purchased from Kaufman was sold to the public in small lots by certain of Registrant's sales representatives (Stipulation, page 15, pre-hearing conference, as corrected, Transcript of Record, vol. 1, page 9). However, sales representative Reigel did not sell any of the unregistered shares of Jayark (R. 2008).

Investigator Hiller testified that Appellant Reigel had told him that he was the Sales Manager of Century Securities (R. 524). However, Hiller later testified that his examination of the books at Century Securities did not corroborate that statement, but, instead, showed that Reigel received no extra compensation beyond his earnings as a salesman (R. 525). Fred Colton, one of the partners of Century Securities, testified that Reigel held no special position with the company, and was a salesman like all the rest (R. 458).

2. With respect to misrepresentations allegedly made pursuant to the sale of registered shares of Jayark stock:

The Commission concluded that Reigel and the other Respondents had no adequate basis for their optimistic representationsand predictions as to the future of Jayark (R. 2003).

Reigel made predictions as to a future rise in the price of Jayark stock if the acquisition of a film library was completed (R. 152). These predictions were made to two witnesses: Mrs. Breslin (Mrs. B) and Mrs. deBiexedon (Mrs. deB).

Mr. Goldstone, who was a consultant to Jayark Films, testified that negotiations for the Samuel Goldwyn film library were conducted and that an agreement was reached with Mr. Goldwyn for the distribution rights to those films

(R. 498). Goldstone further testified that adequate financing had been committed by Walter Heller Company to Goldwyn (R. 500, 501). A letter from George Slaff, Goldwyn's attorney, to the SEC indicated that the Goldwyn negotiations lasted from the first part of May to the end of June, 1963, (Division's Exhibit No. 25), however, the testimony of Goldstone indicated that the negotiations lasted over a longer period (R. 517).

Mrs. B. and Mrs. deB testified for the Division with regard to representations allegedly made by Reigel to them in conjunction with their purchase of Jayark shares. Confirmation of Mrs. deB purchase was dated June 6, 1963 (R. 157) and confirmation of Mrs. B's purchase was dated June 12, 1963 (R. 140). Both witnesses testified that they contacted Reigel to ask him about Jayark stock (R. 140, 156). Mrs. B stated that Reigel had told her that Jayark was about to merge with a television company with a backlog of pictures and the stock would go "sky high","at least triple" (R. 140). Mrs. B further stated that in response to her inquiry as to the financial status of Jayark, Reigel had stated that it was "perfect" (R. 152). Mrs. deB said that she told Reigel that she didn't want to leave money in something for a long period of time but wanted a stock that would double in six months, and that Reigel suggested Jayark (R. 157). Mrs. B later agreed that Reigel had predicted that the price of Jayark would rise if the film

library was acquired (R. 152).

Investigator Hiller testified that he had seen every witness who testified "before he took the stand" and that his earlier memorandums of interviews were shown to them and that these memorandums contained notations other than those which he had put on them at the time of the interview (R. 530, 531).

There was evidence that the adverse financial condition of Jayark was communicated to the two witnesses after their purchase of the shares (R. 148, 163, 164), but that neither witness attempted to rescind or cancel her sale after receiving the information (R. 153, 160).

ARGUMENT

I

A NEW HEARING SHOULD BE GRANTED BECAUSE THE RECORD FROM WHICH THE COMMISSION BASED ITS CONCLUSION WAS TAINTED BY PROCEDURAL IRREGULARITIES WHICH PREVENTED A FAIR AND IMPARTIAL PRESENTATION OF BOTH SIDES OF THE CONTROVERSY AT THE HEARING.

A. The record was incurably tainted by the Hearing Examiner's improper inference drawn from the failure of Appellant to testify.

The Hearing Examiner, in his Initial Decision, admitted that he considered Appellant's failure to testify of "Substantial significance warranting the inference that ...[his] testimony would have been adverse." (R. 1691). The Commission,in an apparent attempt to sterilize the record to avoid reversible error, stated that it did not rely on that adverse inference in its findings. (R. 2009). It is submitted that the Commission has a greater responsibility than merely to review the record with a view to purging it of reversible error.

The language used by the Hearing Examiner (R. 1691) indicates he did not consider the improper inference as simply another factor to be weighed, but concluded that the entire testimony of the Appellant would have been adverse to his case. Such an inference surely would infect each and every finding so that it would be impossible to merely disregard the inference alone. The Commission has not contended

that it disregarded all of the findings of the Hearing Examiner. Indeed, it would seem impossible for the Commission to do so, since the Initial Decision of the Hearing Examiner is a part of the record reviewed by the Commission, and because it would be very difficult for the Commission to make independent findings on many points, particularly with respect to the credibility of witnesses, since the Commission did not have an opportunity to observe their demeanor.

The inference of guilt drawn by the Hearing Examiner was improper on several grounds. Firstly, the inference was improper because the basis of the inference, the failure of Reigel to testify, was induced in large part by the other procedural error of the Hearing Examiner in allowing inquiry into irrelevant and prejudicial areas. Therefore, the Hearing Examiner is estopped from drawing an unfavorable inference.

The Division was allowed to inquire at great length as to the number of companies for which Colton had worked whose registrations had been revoked. When an objection was made to such inquiries (R. 469, line 20, et seq), the Hearing Examiner stated that he would reserve his ruling and allowed the questions to continue.

The Hearing Examiner, so far as the transcript reveals, never in fact ruled on this point during the hearing. However, in his Initial Decision (R. 1696, n. 48) the Hearing Examiner not only found that the inquiry was irrelevant under case law, but acknowledged the unfairness of the inquiry since it

required Colton to meet, without notice, charges of additional violations. Reigel, being without counsel, did not understand the significance of the Hearing Examiner's decision to "reserve decision". However, he did recognize the unfairness of the questions (the unfairness which was belatedly recognized by the Hearing Examiner, R 1696, n. 48) and therefore, not wishing to have his own defense sidetracked by inquiry into alleged violations which he had not been charged with, and was therefore not prepared to respond to, he decided not to testify. 1/

The Hearing Examiner who was advised of the reason that Reigel did not desire to testify (R 519) did not attempt to explain that if the evidence was later found to be irrelevant it would be disregarded, nor did he at this point explain that he would draw an adverse inference from Reigel's failure to testify. Instead, he impatiently stated that:

> "They either want to take the stand or they don't."(R. 518).

Reigel was, therefore, in the unenviable position of having to decide whether to take the stand and be subject to inquiry which the Hearing Examiner later determined to be unfair and irrelevant, without the aid of counsel,

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1/ "Mr. Colton: The respondents are reluctant to take the stand, because yesterday when Mr. Fred was questioning me, a great many of his questions were outside of the scope . . . covered by the charges..." (R. 519)

and without the knowledge that if he failed to testify the Hearing Examiner would deem that his entire testimony, had it been given, would have been unfavorable to his case.

Under those circumstances, fairness would require that the Hearing Examiner should be estopped from drawing an unfavorable inference from Reigel's refusal to testify, or, at the very least, should have had the affirmative responsibility of notifying Reigel, prior to his decision not to testify, that such an adverse inference would be drawn. The procedure actually followed by the Hearing Examiner was so unfair as to cast doubt upon whether the hearing could meet the basic requirements of "fundamental fairness" required by due process of law.

Furthermore, since the hearing Examiner's admitted erroneous ruling (R.1696, n.48) was the proximate cause of Reigel's failure to testify 2/ the Commission is estopped to deny that Reigel was in effect asserting his Constitutional right to refuse to testify in response to an admittedly improper line of questioning which he considered possibly incriminating, and the Commission is estopped to demand of Reigel, a lay witness, any more specific declaration of the constitutional basis for his failure to testify. Therefore, no inference can be drawn from his failure to testify.

2/ Ibid.

In Spevack v. Klein, a non-criminal disbarment proceeding, where an attorney refused to testify at all on the ground that his testimony might be incriminating, the United States Supreme Court stated:

> "In this context 'penalty' is not restricted to fine or imprisonment. It means as we said in Griffin v. California, 380 U.S. 609 (1965) ...the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly' Id., at 614. We held in that case that the Fifth Amendment operating through the Fourteenth, 'forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt.' Id, at 615..." [Emphasis added].

Certainly, in the instant case, a substantial inference of guilt from Appellant's refusal to testify, as in Spevack and in Griffin, supra, makes the assertion of the privilege "more costly" and is clearly improper.

The Court in Griffin, supra, at page 609, further explained its holding by quoting Wilson v. U.S., 149 U.S.60 (1893) which refers to 18 U.S.C. §3481; the court asserted that the following language from Wilson is equally pertinent to the basic Fifth Amendment right itself:

> "...the Act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witness. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a

> degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him." (149 U.S. p. 66).

It should be noted well that the above explanation is particularly pertinent in the case at bar since Reigel was not represented by counsel.

Since the Hearing Examiner is estopped to draw an inference of guilt,and is also estopped to deny that Reigel was asserting his Fifth Amendment right not to testify, the cases cited by the Commission for the proposition that an inference can be drawn from failure to testify in an administrative proceeding, 3/ are inapplicable. Indeed, the cases themselves are doubtful authority today. In N. Sims Organ and Company, supra, relied upon by the Commission (R. 2009), the court referred to U. S. v. Costello, 365 U. S. 265 (1961)

3/ (R. 1691, 2009) N. Sims Organ and Company, Inc., 40 SEC 573, 577 (1961) aff'd 293 F. 2d 78, 81 (C.A.2, 1961), cert.denied, 368 U.S. 968; Barnett v. U. S. 319 F. 2d 340, 344 (C.A.8, 1963.)

in a footnote, acknowledging that Costello cast some doubt on its holding. 4/ In Costello, the Court refused to validate the inference of guilt drawn by the Appellate Court from the Appellant's failure to testify. The Court, instead, found it "unnecessary to decide in this case whether an inference may be drawn in a denaturalization proceeding from the failure of defendant to present himself as a witness." Id. at 278. Also, the court indicated, evidently as a factor in failing to decide the issue, that the improper inference had been drawn, unlike in the instant case, by the Appellate Court, not by the trial court. So in Costello there was no issue of the trier of fact being influenced in its findings by an improper inference. Therefore, the Court in Costello could properly disregard any improper inference in reviewing the record.

Recent cases have recognized that the right to engage in a profession is a right of such significance as to require the utmost protection from due process. Garrity v. New Jersey 385 U.S. 493 (1967); Spevack v. Klein, supra; Elfbrandt v. Russell, 384 U.S. 11 (1966); Konigsberg v. State Bar of California, 353 U. S. 252, 257 (1957); Schware v. Board of Bar Examiners, 353 U. S. 232, 249 (1956); Shively v. Stewart 65 Cal. 2d 475, 421 P. 2d 65 (1966); Elder v. Board of Medical Examiners, 241 Cal.App.2d 246, 50 Cal. Rptr. 304 (1966); People v. One 1960 Cadillac Coupe, 62 Cal.2d 92, 396 P.2d 706 (1964).

4/ 293 F 2d at 81.

cert. denied. 385 U.S. 1001. The California Supreme Court stated in Shively v. Stewart, supra, at 480:

> "A disciplinary proceeding has a punitive character, for the agency can prohibit an accused from practicing his profession . . . Since the agency is the accuser, a party to the proceeding, and ultimately makes a decision on the record, its concentration of functions calls for procedural safeguards...."

It is quite possible that because of the quasi-criminal nature of these proceedings, an inference of guilt from failure to take the stand would under any circumstances be unconstitutional. However, regardless of whether that is so, in the instant case the Hearing Examiner is estopped from drawing such an inference of guilt and is estopped from denying that Reigel was asserting his right to refuse to answer incriminating questions since it was the admittedly improper action of the Hearing Examiner (R.1696,n.48) which induced Reigel not to testify. (R. 519).

B. The imposition of a penalty by the Commission far in excess of that which the Hearing Examiner assessed indicates that the record before the Commission may have failed to reflect accurately the substance of the transactions involved, and/or that the penalty was grossly excessive, arbitrary and capricious.

The Hearing Examiner, who heard the witnesses testify, found that the degree of Reigel's culpability was such that the interests of the public would be protected by merely suspending him from his profession for six months (R. 1704). It should be kept in mind that this determination was made even though the Hearing Examiner heard no testimony from Reigel and relied upon an improper inference of guilt, which was based upon Reigel's failure to testify. The Commission, on the other hand, found that a complete bar from the profession was indicated, even though they allegedly excised this improper inference from the record, and did not consider it in their decision. Such a disparity would seem to indicate that from the vantage point of hearing the testimony of the witnesses firsthand, the Hearing Examiner drew a quite different conclusion as to the seriousness of Reigel's conduct, than did the Commission.

The Courts have long recognized the importance of the Hearing Examiner's observations with respect to demeanor and credibility. In Utica Observer-Dispatch, Inc. v. NLRB, 229 F. 2d 575, 577 (1956), the court pointed out:

> "The Board is, of course, obliged to give weight to the findings of the Trial Examiner, especially where they rest on credibility and demeanor of the witnesses."

It would seem that the Hearing Examiner would, in the instant case, be in a much better position to determine the degree of culpability than would the Commission, from a reading of the cold record. This is particularly true with regard to the charge of misrepresentation, since the major evidentiary support was in the form of testimony. Indeed, the great disparity between the penalties imposed by the Hearing Examiner and the Commission indicate that the record failed to accurately reflect the tenor of the testimony by which the substance of the transactions involved was deduced.

The only other possible explanation for the Commission's apparently arbitrary action is that there is a complete lack of standards as to the penalty which prohibited conduct calls for. If there is such a lack of standards, then the Commission's action, in increasing the penalty, must be termed arbitrary and capricious. To deprive an individual of his livelihood under such conditions is grossly unfair, as recent United States Supreme Court cases, as well as California cases, have pointed out in holding that the right to engage in a profession is a right of such significance as to require the utmost protection of due process. Garrity v. New Jersey, supra; Spevack v. Klein, supra; Elfbrandt v. Russell, supra, Konigsberg v. State Bar

of California, supra; Schware v. Board of Bar Examiners, supra; Elder v. Board of Medical Examiners, supra; Shively v. Stewart, supra, People v. One 1960 Cadillac Coupe, supra.

The wide range of penalties imposed by the Hearing Examiner (from censure of Pambrun to a six month suspension for Reigel, to complete bar for Nees, the Registrant and the partners) indicates that the Hearing Examiner was convinced from his direct exposure to the testimony and demeanor of the witnesses that there was a wide disparity of culpability among the alleged violators, and that individualized treatment was indicated. The Commission, on the other hand, concluded that a complete bar should be applied to all the alleged violators. It appears that the Hearing Examiner treated with a scalpel that which the Commission went after with an axe.

The approach of the Commission would not be so disconcerting if it had offered some explanation for its actions or indicated some standards by which it reached its conclusions. It should be noted, that the Commission had earlier stipulated to an offer of settlement from another salesman, John Desbrow, who was charged with the same violations as Reigel (R. 1273); pursuant to this offer of settlement Desbrow was merely suspended for 45 days. It is extremely difficult to determine why Desbrow received such a light penalty, while the other salesmen were barred in perpetuity from engaging in their chosen profession, unless the fact that

Desbrow waived his constitutional right to a hearing was relevant. However, it should be recalled that it is unconstitutional to make more "costly" the exercise of a constitutional right, so that failure to waive one's constitutional right to a hearing should not result in more severe penalties, Spevack, supra.

C. The witnesses for the division were improperly educated by an Agent of the Division prior to their testimony.

In reviewing the evidence presented by the Division, it is of critical importance, to both the credibility of the testimony and the fairness of the hearing, that investigator Hiller admits that each witness for the Division,prior to his testimony, had his memory "refreshed" from notes prepared by Hiller and not the witnesses (R. 530, 531).

> "Hearing Examiner Gross: Did you see every investor witness who appeared here before he took the stand?
>
> The Witness [Hiller]: I believe so.
>
> Hearing Examiner Gross: All right, Go ahead.
>
> By Mr. Fleischman:
> Q. You testified that documents were showed to them. Can you tell me what those documents were?
>
> A. The documents were the memorandums of interviews.
>
> Q. Did these documents contain anything on them aside from what you had put on them at the time of the interviews? In other

words, were there any kind of pencil marks or notations on these documents when they were shown to the witnesses - underlinings or any other kind of notations?

A. Yes.

Q. Did you have any conversations with the witnesses concerning what appeared on the face of these documents - any kind of conversation?

A. I had conversations with the witnesses, that is right. (R:. 530, 531)."

It is submitted that in light of this highly irregular conduct on the part of the Division's investigator, the rights of Reigel, as well as the other salesmen, have been substantially prejudiced. The prompting and refreshing element of those pre-testimony conversations was more conducive to consistency than truth, and, as such, was improper. This conduct was particularly prejudicial due to the fact that Reigel was not represented by counsel and could not effectively cross-examine Mr. Hiller and the investor witnesses in order to determine the extent, if any, to which Mr. Hiller's notes influenced both the manner in which such witnesses testified, and the content of their testimony. Indicative of the lack of approbation with which such "education techniques" are viewed, is the prohibition under California law which, at the time of the Hearing, stated:

> "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact was fresh in his memory and he knew that the same was correctly

stated in the writing." (Emphasis added). C.C.P. Section 247. 5/

It is further submitted that this highly irregular "refreshing" technique must, at the very least, cast significant doubt on the credibility of those witnesses.

D. The record was further tainted by the admission and reliance on incompetent hearsay evidence.

The findings of the Commission that Reigel had no reasonable basis for representations made by him to buyers concerning Jayark stock is based in large part upon a letter which was clearly hearsay (R.2004). Although it has often been held that technical rules of evidence do not apply in an administrative hearing, it is also the rule that relevant evidence should be admitted "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." Cal. Govt. Code 11513 (c). Using this common sense approach there is a very serious question as to whether the letter in question should even have been admissible, let alone whether it should have been the basis for a finding which resulted in Reigel being permanently prohibited from engaging in his

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5/ This section was changed when California adopted the Uniform Evidence Code.

chosen profession.

The Commission's determination that there was no adequate basis for optimistic representations with regard to the future of Jayark stock was largely based upon their finding that there was never a "firm arrangement" with Goldwyn for the releasing of films (R. 2004). The basis for the latter finding was a letter from George Slaff, Goldwyn's attorney (R. 2003). It appears obvious that the author of this hearsay evidence (Slaff), as the attorney of the party who had backed out of the contract, had every reason to color his statements regarding the contract in such a way as to negate the finality of the negotiations. For if the negotiations had been finalized, the "backing out" done by Goldwyn would have amounted to a breach of contract. That this piece of hearsay evidence was exactly the kind of evidence that the hearsay rule was meant to exclude -- evidence where the right to cross-examination is crucial to a fair and unbiased explanation, seems obvious.

Since the only relevant evidence to support the Commission's finding that "Respondents had no adequate basis for their optimistic representations regarding the acquisition of film libraries," (R. 2003) is hearsay (the letter from attorney George Slaff) there is insufficient evidence to support the findings on review.

The Court stated in a post A.P.A. case, Willapoint Oysters, Inc. v. Ewing, 174 F 2d 676, 691 (9th Cir.1949):

". . .the findings, to be valid, cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla."

The Commission attempted to add additional support to the above finding by stating that Kaufman wrote a letter to Appellant referring to the negotiations but did not mention that he had a "firm arrangement". Such "non-evidence" gives no support to the finding. The letter itself would have been hearsay, and to draw an inference from the failure to state something in the letter, is clearly so tenuous and bootstrap as to be completely irrelevant. Certainly, by its very definition, irrelevant information is not sufficient to support a finding. For the same reasons, the fact that no public announcement was made is irrelevant (R. 2004). There is not even a mere "scintilla" of relevant evidence, other than the highly suspect letter from Goldwyn's attorney, to support the Commission's finding.

E. Reigel was without counsel during substantive portions of the proceedings, which proceedings, though designated "administrative" in nature had the effect of imposing quasi-criminal sanctions denying petitioner the right to engage in his profession.

In the instant case Reigel has been permanently barred from his chosen profession, and accused of acts which could be the basis of criminal charges on a hearing record bearing the taint of numerous procedural irregularities which singly,

and most certainly cumulatively, interferred seriously with a proper determination of the facts. Although opposing counsel may argue that a particular irregularity is not significant enough to compel a new hearing, any objective view of the proceedings would show that the numerous irregularities, each of which casts doubt upon the fairness of the outcome, adds up to a cumulative lack of the "fundamental fairness" which is necessary to substantive due process.

It should be kept in mind that the effect of the numerous irregularities was multiplied by the fact that petitioner was not represented by counsel at the most critical point in these proceedings -- the initial hearing before the Examiner. It is the record which is the product of that hearing upon which the Commission based its findings.

The United States Supreme Court has pointed out that when counsel is not available during a critical stage in the proceedings, the effectiveness of counsel at later stages can be greatly reduced, and the truth-seeking function seriously interferred with. Miranda v. Arizona, 384 U.S.436 (1966) Although it is not contended here that Petitioner was deprived of a right to counsel, it is contended that the lack of counsel magnified the impact of the other procedural infirmities, and interferred with the compilation of a record which

adequately reflected the facts of the transactions in the instant case.

Since Reigel was without counsel the Hearing Examiner should have had the affirmative duty to use even greater care concerning the admission of irrelevant evidence, and to avoid using technical language without explaining to Reigel, in lay language, the meaning of the terms. 6/ The importance of being represented by counsel is particularly acute in a hearing such as that held in the instant case where Reigel was charged with violation of a highly technical statute, and was confronted with a protagonist (the Division's attorney) highly familiar with the lexicon of SEC terminology. Therefore, a new hearing at which Reigel will be represented by counsel is the only way that a proper determination of the facts can be made.

6/ For example: The Hearing Examiner admitted evidence he later found to be irrelevant and unfair and "reserved ruling" on the objections without explaining to Reigel the significance of these terms (R. 469, line 20, et seq, R. 1696).

II

THERE IS NO EVIDENCE IN THE RECORD TO SHOW THAT APPELLANT HAS VIOLATED SECTION V OF THE SECURITIES AND EXCHANGE ACT OF 1933 BY WILLFULLY SELLING UNREGISTERED SECURITIES.

A. Reigel did not sell unregistered securities.

The Commission admits in its Findings (R. 2008) that Reigel did not sell the unregistered shares of Jayark. Neither the SEC in its Findings, the Hearing Examiner in his Initial Decision, nor the Division of Trading and Markets, in its Briefs, have cited any case in which a salesman has been found to have violated Section V of the Securities and Exchange Act of 1933, when he has not, in fact, sold or delivered unregistered securities. The mere fact that Reigel may have assisted in acquiring the shares for his employer, does not implicate him in the subsequent action of his employer in dealing with the shares. Certainly, Reigel had a right to assume that his employer would comply with the law in selling those securities. It has not been shown that Reigel had a duty to inquire into the correctness of his employer's belief that the shares were exempt from registration. This is particularly true since Reigel did not, himself, sell any of the unregistered shares, and where, as here, he did not own an interest in the unregistered shares sold by others to the public.

Since the Commission was confronted with the fact that Reigel did not sell unregistered shares to the public, it

asserted that he "participated" (R. 2008) in the sale of unregistered shares. The use of the word "participated"in the Commission's decision is comparable to the "activist" theory utilized by the Division of Trading and Markets in its Initial Brief dated October 2, 1965 (R. 1305). Both terms represent efforts to overcome two insurmountable problems of proof confronting the Commission: (1) Reigel did not sell unregistered shares. (2) Reigel was not a principal of Century Securities which did sell unregistered shares. In a futile effort to establish that Reigel was something more than a salesman of Century Securities, the Division of Trading and Markets attempted to prove that he was Sales Manager (R. 1305). This assertion was controverted by the unequivocal testimony of Fred Colton (R. 458) and rightly not adopted by either the Hearing Examiner in his Initial Decision or the Commission's Findings.

B. Reigel's conduct with respect to the unregistered securities sold by others was not "willful".

Since Reigel didn't sell any unregistered securities whatsoever, he obviously could not have willfully sold unregistered securities.

Nevertheless, Reigel vigorously disputes the seemingly irrelevant contention that he had sufficient knowledge of the status of Jayark shares to have been able to have acted willfully with respect to them. No evidence was presented

to show that Appellant knew that the stock was not exempt from registration. 7/ Therefore, it would have to be shown that appellant should have known of the status of the shares in order to conclude that he could have acted willfully.

The Commission states in its Findings (R.2007) that:

> "The asserted reliance by Registrant and its partners upon a written statement by Kaufman that Jayark's counsel had advised that the shares were exempt from registration under existing regulations could not be justified, and they should have made inquiry to determine the basis for any such exemption."

It should be noted that the Commission says the partners should have made inquiry. Nowhere do they state that Reigel should have undertaken such inquiry. To place such a responsibility upon a salesman who acted in good faith would seem unwarranted. Indeed, the cases cited by the Hearing Examiner and the Commission do not place such a responsibility upon employees, but merely hold that the proprietors of brokerage firms should have a responsibility to make reasonable inquiry into the registration status of the shares they deal with. 8/ (R. 1675, R 2007).

7/ Evidence was introduced which showed that appellant had been informed in a letter from Kaufman that Kaufman's attorney had advised that the shares would be exempt from SEC registration. (See Division's Exhibit No. 3, letter dated September 9, 1963.)

8/ SEC v. Culpepper, 270 F 2d 241 (C.A.2 1959); Assurance Investment Co., Securities Exchange Act Release 7862, (April 15, 1966) p. 2; Securities Act Release No.4445 (Feb.2, 1962), Morris J. Reiter, Securities Exchange Act Release No. 6849, (July 13, 1962); Gilligan,Will & Co., 38 SEC 388, 395 (1958), aff'd 267 F. 2d 461 (C.A. 2, 1959), cert. denied 361 U.S. 896.

No cases were cited for the specific holding that Reigel acted willfully with respect to the unregistered Jayark shares (R. 2007, 2008). However, in concluding that the partners, Colton and Fleischman, acted willfully with respect to unregistered securities, the Hearing Examiner cited several cases. Although these cases may give some support to the proposition that the partners acted willfully with respect to the securities, the cases cannot be used inferentially to support a finding of willfulness on the part of Reigel. Thompson Ross Securities Co. (R.1673 n.8) 6 SEC 1111, 1112, is comparable to Culpepper, supra, as it deals with the responsibility of the proprietor of a firm to inquire as to whether shares are exempt from registration. Hughes vs. SEC, 147 F. 2d 969, 977 (CADC, 1949) and Schuck vs. SEC, 264 F. 2d 358, 363, 2.18 (CADC 1958) (R. 1673, n.8) define willfulness as requiring that the "person charged with the duty know what he is doing. It does not mean that he . . . must suppose that he is breaking the law." In Hughes the proprietor of a firm, after receiving repeated notifications from the SEC that she was not making sufficient disclosure to her clients, defended an action based on that violation, with the argument that her interpretation of the law indicated that she was making sufficient disclosure. In Schuck, the proprietor had failed to maintain a sufficient net capital as required, and his defense, that the failure was inadvertent, was rejected. In both cases the individuals

should have been "charged with the duty" since they were the proprietors, and therefore had the ultimate responsibility to see that their businesses were run in accordance with the law. No cases were cited which would "charge" appellant Reigel "with the duty" of inquiring into the validity of the claimed exemption from registration for Jayark stock.

The last two cases cited by the Commission in support of their finding that the partners acted willfully, were Henry P. Rosenfeld, 32 SEC 731, 739, 740 (1951) and Underhill SEC Release No. 7668 (Aug. 3, 1965) (R. 1673, n.8). These cases likewise do not support a finding of willfulness with respect to the sale of unregistered securities on the part of Reigel. In Underhill, a salesman was found to have made flagrant misrepresentations to induce the sale of stock with "conscious and knowing intent" (Id. at 7) while in Rosenfeld, similar misrepresentations were made and found to be "either deliberate or grossly reckless" (Id. at 739). Naturally, such misrepresentations will support a finding of willfulness and it is not necessary to find that there was an "intention to violate the law" (Underhill at 7), for when an individual sells stock to the public certainly he "has a duty" to refrain from making deliberate, intentional or grossly reckless misrepresentations. 9/

9/ It should be noted that these cases were not cited with regard to alleged misrepresentations by any of the Respondents with respect to the sale of the registered shares of Jayark, and no allegations were made as to misrepresentations by Reigel with respect to the unregistered shares of Jayark (as will be illustrated infra such representations as were made by Reigel with respect to the registered shares of Jayark were reasonable and proper).

But Reigel made no sales of unregistered stock and made no representations as to the registered or unregistered status of the stock and no such representations can be implied because the only Jayark shares sold by Reigel were properly registered. These cases are therefore not authority for the proposition that an individual, as Reigel in the instant case, has "a duty" to inquire into his employer's belief that the shares were exempt from registration.

In the absence of authority for the proposition that Reigel should have known of the status of the stock, in order to make a finding of willfulness, the Commission must show that he had actual knowledge. No evidence of actual knowledge was considered and, on the contrary, evidence was presented which indicated Reigel reasonably believed that the transaction in Jayark was proper. The Hearing Examiner in his Initial Decision (R.1698) stated: "Since registrant was an underwriter of Jayark stock earlier in the same year, at which time there was no question as to the propriety of the issue, only substantial evidence would warrant a finding of such knowledge." The above statement which evidently refers to salesmen, other than Reigel, who actually sold unregistered Jayark stock, would indicate that Reigel also had reasonable grounds for believing there was no irregularity in the transaction in question. Therefore, it does not appear to have been unreasonable of Reigel to trust to Kaufman's assurances, based on a legal opinion that the stock was exempt.

Thus, on a fair reading of the record it is evident

that the allegation that Reigel bears responsibility for the sale of the unregistered stock fails in every respect. The Commission conceded that Reigel did not sell or deliver unregistered Jayark stock (p. 2008). If he did not sell or deliver such stock, he cannot be held liable as a seller for anyone else's sale of such unregistered stock. This would be true even if he had actual knowledge of the status of the stock. That liability does not attach is even more clearly demonstrated by reason of the Division's failure to prove that he had or should have had any such knowledge.

III

THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SHOW THAT PETITIONER VIOLATED THE ANTI-FRAUD PROVISIONS OF THE SECURITIES ACT BY FAILING TO INFORM CUSTOMERS OF THE FINANCIAL CONDITION OF JAYARK.

Only two witnesses called by the Division purchased Jayark shares from Reigel; Dorothy Breslin, hereinafter referred to as Mrs. B, and Anne Breslin deBiexedon, hereinafter referred to as Mrs. deB. Whether or not Reigel was guilty of fraudulent misconduct towards these customers depends on the nature of the representations made, the nature and significance of any omissions, and Reigel's basis for believing the representations that he did make were true.

In the case of Trussell vs. United Underwriters,Ltd., 228 F. Supp. 757 (U.S.C.D. Dist.Colo. 1964), at page 762, the court states:

> "[N]either Section 17(a)(2) nor Rule 10B-5(2) requires a seller to 'state every fact about stock offered that a prospective purchaser might like to know or that might, if known, tend to influence his decision'" Quoting from Otis and Company v. SEC. 106, F. 2d 579, 582 (1939 6th Cir.)

If a salesman is not obligated to reveal every relevant fact to a prospective purchaser as indicated above, it follows that he is not obligated to inform that customer about those facts which are clearly not relevant to the purchaser's intent. Thus, the Division must show not only that Reigel failed to inform his customers about the financial position of Jayark, but also that such information was

material to the purchaser under all of the circumstances, and would have affected the customer's intent to purchase had he or she known of the financial facts not presented.

In this case, it is quite apparent that the purchasers were not looking to the present financial condition of Jayark to justify their purchase. Neither woman even considered the possibility of cancelling her purchase or rescinding her agreement, though she received the information immediately after her purchase (R. 148, 163, 164), and though she had ample time to do so, because the financial position of Jayark was not material to her contemplated bargain. Mrs. deB admits frankly (R. 163) that she did not even take the time to read the information sent, for she was interested in the speculative value of the stock, not its dividend-producing ability (R. 156). Mrs. B also concedes that she was sent the full information relating to Jayark's financial condition (R. 148).

It is important in this regard to recognize that both women were looking for speculative stock (R. 152, 163) not dividend paying investments. In spite of the lengthy discourse in the Division Brief about knowledge of the financial position of Jayark itself, it did not produce any evidence that such knowledge was relevant to the buyer's bargain. Nor did it show that the financial deficits of Jayark lessened the value of the stock in the minds of these speculating investors. On the contrary, knowledge of Jayark's deficits might have provided

increased incentive to purchase the stock, for it is well known that where a significant upturn in profit is anticipated, a previous loss, which may be carried over subsequently, is a considerable tax advantage to the speculator.

If either buyer thought that the previous operating losses of Jayark were important negative considerations, they could have attempted to rescind or cancel, yet they did neither, in point of fact, neither Mrs. B nor Mrs. deB had sold their stock even at the time of the hearing, thus demonstrating that it was the speculation interest in Jayark that motivated them (R. 143,160).

The underlying assumption of the Division's charge that Reigel had willfully failed to disclose the financial position of Jayark was that by such deliberate omissions he was able to induce an otherwise unwilling buyer to purchase Jayark stock. However, both witnesses were eager to purchase for they wanted a quick gain in the market (R. 151, 157) the fast dollar. In response to their inquiries Reigel told them about Jayark. Mrs. B testified that Reigel explained to her the possibilities of Jayark's acquisition of valuable film distribution rights (R. 152). The independent decision to purchase that stock made by both women was the result of their own judgment. These women were neither senile nor naive. Both were fully capable of making reasoned decisions; both were aware of the realities of a speculative stock purchase.

IV

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONCLUSION THAT THERE WAS NO REASONABLE BASIS FOR THE PREDICTIONS MADE BY APPELLANT.

In order to evaluate the reasonableness of Reigel's projections with regard to the price of Jayark stock, it is necessary to examine closely the testimony of the witnesses to discover the content of those projections. The following analysis of the hearing transcript will show that the actual extent and nature of the alleged projections is in considerable controversy.

Mrs. B testified that Reigel told her that the stock would go "sky high" at least "triple" (R. 140), and she later testified that she was "promised the moon with a fence around it." (R 147), and that Jayark stock "was going to the moon".(R. 151). Subsequently, however, she admitted that those phrases were probably not Reigel's but were her own interpretations of what he said (R. 151). Later in her testimony she agreed that it was fair to describe what Reigel had told her in the following words: "The stock would sell at higher prices <u>if</u> the libraries were negotiated." (R.152) (Emphasis added.)

Reigel does not deny that he was very optimistic about the future of Jayark. Indeed, the evidence shows that at the time in question he had every right to be. It is apparent, however, that this optimism was translated into far more glowing terms in the imagination of Mrs. B whose per-

sonal involvement and disappointment in a speculative venture clearly colored her testimony. Mrs. deB stated that she was looking for a speculative stock that would double her money in a short period of time. (R. 157). She testified that she told Reigel of her desire and that as a result he recommended that she buy Jayark stock. This recommendation by Reigel has been interpreted by counsel for the Division as being equivalent to a positive affirmative representation that Jayark stock would, in fact, double within that short period of time. It is submitted that this analysis is incorrect, and finds no foundation in the facts of this case.

Reigel's obligation as a salesman was to make a bona fide and honest attempt to meet the needs and desires of his customers. When Mrs. deB requested a fast growing speculative stock it was Reigel's duty to recommend to her what he believed to be a good speculation. A good speculation differs considerably from a blue chip investment. By definition, speculation involves a chance, the chance that the price of the stock will increase upon the happening of some event. It is rudimentary that if that event does not occur, then the price of the stock will not rise and the speculative, anticipated profits will not be realized. The Commission seems to suggest that the salesman may be held for fraud whenever he sells a speculative stock that fails to achieve its potential. The result of this suggestion is to make the salesman the personal guarantor of the speculations that he

sells. Such a result is neither desirable nor reasonable.

There is not a shred of evidence that Reigel made his predictions in bad faith. Furthermore, the Division failed to prove that the projections made by Reigel on the future price of Jayark were unreasonable, primarily because there was overwhelming evidence to the effect that such projections were, in fact, reasonable. These projections were based upon the possibility of Jayark Films acquiring the distribution rights to a significant film library. It has not been disputed that such an acquisition would have considerably increased the price and value of Jayark's stock. Rather, the Commission concluded that there was no adequate basis for the optimistic representations regarding the acquisition of film libraries. (R. 2003) The Commission's position in this respect is untenable. The unchallenged and uncontradicted testimony of Duke Goldstone, a primary party to the negotiations for the acquisitions of the distribution rights of the above mentioned film library, firmly establishes that such an acquisition was very probable indeed (R. 497, 498, 499,500). In fact, a deal for the distribution of a $12,000,000.00 film library owned by Samuel Goldwyn, was consummated (R. 498,499).

> "[Goldstone] A: I was present at all of the meetings as these negotiations developed, until the final meeting when Mr. Goldwyn said 'all right we have a deal' and shook hands." (R 498).

At that time the negotiations were completed and Jayark to all intents and purposes had made a deal with Goldwyn to distri-

bute the Goldwyn films on television (R. 498).[10/]

"Q You said you shook hands and had a deal; is that right?

A That is right. (R 499)."

In addition, Goldstone testified that the ability of Jayark to finance the project was assured by the backing of the Walter Heller Company and that a letter to that effect was mailed to Mr. Goldwyn (R. 500, 501). Thus, there can be no question that the statements about the future of Jayark were founded upon substantial fact. Projections made on the basis of such fact are in no sense reckless.

Only the unanticipated breach of contract by Goldwyn prevented the film acquisition that would have significantly affected the price of Jayark stock. The Division cannot negate the honest and reasonable nature of the statements made simply because, in the final analysis, Jayark was not able to acquire those valued film rights. The Division is operating from a position of hindsight not available to the parties at the time of the questioned transaction.

Goldstone further testified that Jayark was prepared to sue Goldwyn for the breach of contract, but decided not

10/ The technical enforceability of the contract with Goldwyn was not really in issue in the hearing. Therefore, in citing the possible application of the California Statute of Frauds (R.2004 n. 4 Commission's Findings) is to say the least inappropriate. Any number of exceptions to the Statute of Frauds (e.g. detrimental reliance), might have estopped Goldwyn from asserting the Statute. Goble v. Dotson, 203 C.A. 2d 272, 21 Cal.Rptr.769 (1962). Of course there can be a valid contract which is nevertheless unenforceable due to the Statute of Frauds. O'Brien v. O'Brien, 197 C. 577, 24 P. 861 (1925).

to only because, "... when Paramount became serious and interested we decided it would be a bad thing, businesswise, to go ahead with the suit against Goldwyn at a time when it looked like we had a deal with Paramount." (R. 505).

Thus, it is clear that the Paramount negotiations had also advanced to a serious stage, coming quite close to consummation. Walter Heller was working with Jayark to provide a substantial financial basis for any deal that could be reached. (R. 505, 506). Negotiations between principals of the stature of Walter E. Heller, Samuel Goldwyn and Paramount are the substance, the essence of what makes for a speculative security.

The Division neither confronted nor disputed this evidence of Mr. Goldstone, evidence which established clearly that Jayark at first was, in fact, on the brink of a deal that would have increased the value of its stock greatly, and that was apparently later consummated (R. 499,506).

The sales made to Mrs. B and Mrs. deB were made during the period of the Goldwyn negotiations. 11/ There is evidence in the record that Reigel was aware of the status of these negotiations at the time of his making any representations to the purchasers in that he had been informed both by his employer and by correspondence from Kaufman (R. 427, 445 and Respondent's Exhibit E.)

11/ The purchases were confirmed on June 12, 1963, and June 6, 1963 (R.140,157). The Slaff letter indicated that the negotiations were going on from early May to late June. (R.2003).

The Division failed to prove the testimony of Goldstone was false. It failed to prove the acquisition of the distribution rights to a valuable film library was not in the offing. It failed to prove that Reigel's predictions were not based on reliable information. It failed to prove that the price of Jayark stock would not have gone up as predicted. It is submitted that in view of the fact that witnesses needed to make such proof were available locally, the Division's failure to call such witness is a clear admission of the validity of Goldstone's testimony. The importance of this testimony cannot be overemphasized.

The Commission in its Findings (R.2003), and the Hearing Examiner in his Initial Decision (R.1693),both asserted that "predictions of specific and substantial increases in the price of a speculative security in a relatively short period of time are inherently fraudulent and cannot be justified."Although these quotations lead one to believe that even if there is a substantial and reasonable basis to support a prediction, such a prediction is improper, an examination of the cases cited by both the Commission and the Hearing Examiner indicate that in every case where this language has been used there has been overwhelming and independent evidence to support the unreasonableness of the prediction, furthermore, <u>independent</u> findings that the predictions had no reasonable basis were in each case made. Therefore, the language in the cases cited is mere dicta. There has been no square holding on this point. Indeed,

even this dicta evidently has never been repeated in a federal court as the only citations by the Hearing Examiner and the Commission, where this language can be found, are to orders or releases of the Commission. The one federal court case cited by the Hearing Examiner (R. 1693 n. 41) for this proposition, SEC v. Johns, 207 F. Supp. 566, U.S. D.C. D. New Jersey 1962) does not even repeat this dicta. It is very difficult to understand why the Hearing Examiner cited Johns for this proposition, particularly since it actually gives aid to Appellant's case. The court stated in Johns at page 573 that it was not a defense "that representations made to induce sale of stock dealt merely with forecasts of future events related to the projected earnings and the value of securities, except to the extent that there is a rational basis from existing facts upon which forecast can be made, and a fair disclosure of the material facts." [Emphasis added]. Johns therefore makes it clear that a rational basis for predictions is to be taken into consideration in determining whether representations were fraudulently made, and that "predictions of specific and substantial increases in the price of a speculative security in a relatively short period of time" (R. 1693) is not inherently fraudulent and may be proper when "there is a rational basis from existing facts upon which forecase can be made, and a fair disclosure of the material facts." Johns, supra at 573.

It should be further noted that the cases cited by the Hearing Examiner and by the Commission (R.1693,2003) are not analogous to the case at bar since they did not deal with predictions of increases in price which were expressly made conditional on the happening of a future event.

CONCLUSION

Due to the procedural irregularities which substantially impaired the efficacy and fairness of the fact finding process at the hearing, and cast doubt on its constitutional sufficiency, and due to the lack of sufficient evidence in the record in support of the alleged violations, Appellant Reigel respectfully requests that with respect to him:

1) That the Court set aside the aforementioned decision of the Hearing Examiner and the Findings of Fact made by him in support thereof;

2) That the Findings and Order of the Commission be set aside;

3) That the Commission be ordered to convene a new hearing for the purpose of taking evidence, including the testimony of Reigel, free of the irregularities that tainted the previous hearing, and with the presence of counsel for this Appellant, William Reigel.

Respectfully submitted,

BERNARD I. SEGAL

Bernard I. Segal,
Attorney for Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM REIGEL, Appellant, -vs- SECURITIES AND EXCHANGE COMMISSION, Respondent.	No. 22459

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

ELSIE R. STIVERS, being first duly sworn, deposes and says that she is a secretary in the office of Bernard I. Segal, attorney at law; that on December 12, 1968, she served the attached Appellant's Opening Brief on the persons named below, by placing a copy thereof in an envelope properly addressed to them at their address appearing under their names, which addresses are the last addresses of said persons known to her, and the envelope containing sufficient government postage was deposited by her in the United States mail at 5670 Wilshire Boulevard, Los Angeles, California 90036, for delivery by the United States Post Office Department as directed by said envelope.